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No. 80-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION, *Petitioner*,

v.

LONG ISLAND RAILROAD COMPANY AND METROPOLITAN TRANSPORTATION AUTHORITY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION AS *AMICUS CURIAE*

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QUESTIONS PRESENTED

Is the freedom to determine whether public employees of states should have the right to strike an attribute of state sovereignty protected by the Tenth Amendment with which federal regulation may not interfere under our system of constitutional federalism?

If the answer is yes, is the ownership by the State of New York of the Long Island Rail Road passenger commuter transportation service a state activity typical of services states traditionally have afforded their citizens?

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BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

The American Public Transit Association (APTA) has received the written consent of petitioner and respondents to file a brief *amicus curiae* in support of respondents in this action. APTA is the national representative of most local publicly owned mass transit systems and the nationwide repository of information about local public transit. Local publicly owned mass transit systems today provide more than ninety percent of all mass transit rides in the United States. APTA has a significant interest in this case because it may affect the states' ability to structure relationships with their public transportation employees and because it presents legal issues closely related to issues being litigated in several federal courts in which APTA or its members are parties.

This Court decided in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that, under the Tenth Amendment to the Constitution of the United States and our system of federalism, a federal statute cannot be applied to certain functions of state and local governments where that statute would displace a state's ability to structure relationships with its employees. Therefore this Court held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206, 207 (1976), cannot constitutionally be applied to such integral operations of certain state and local governmental functions. The resolution of the lower court cases in which APTA or its members are parties turns on whether local publicly owned mass transit systems fulfill such governmental functions, typical of services states traditionally have provided their citizens. All the lower courts that have ruled on the issue, except for a single federal district court, have found that local public transit systems are traditional and integral governmental functions, typical of the essential public services provided by state and local governments around the country. These courts therefore have held that the minimum wage and maximum hour provisions of the FLSA cannot be applied to public transit employees.[1]

In disposing of the case at bar, this Court must consider whether the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976), if applied to state employees, would "operate to

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[1] *E.g.*, *Dove* v. *Chattanooga Area Regional Transportation Authority*, Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 2, 1981); *Kramer* v. *New Castle Area Transit Authority*, Civ. A. No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed*, No. 81-2223 (3d Cir. Aug. 10, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Francis* v. *City of Tallahassee*, Case No. 79-446 (2d Cir. Fla. Dec. 8, 1980); *contra Joiner* v. *City of Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *appeal docketed*, No. 81-7789 (11th Cir. June 14, 1981).

directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities*, 426 U.S. at 852. If this Court concludes that the federal strike procedures required by the Railway Labor Act do displace New York State's ability to structure certain elements of its employee relations, an essential attribute of state sovereignty, this Court then must examine the nature of the Long Island Rail Road (LIRR). It must determine whether the publicly owned LIRR, an integral part of the Metropolitan Transit Authority's (MTA) system of intrastate commuter passenger service, fulfills a public service function integral to and typical of state government, as do local public mass transit systems throughout the nation.

Like respondents, APTA's members provide local public transportation. Many local public transit systems consist of a mix of various forms of transportation suited to the local needs, including buses, subways, trolleys and commuter rail. American Public Transit Association, *Transit Fact Book* at 14 (1979) (Transit Fact Book).[2] Thus APTA is uniquely suited to provide the Court with an understanding of the nature of local public mass transit and of the possible implications of this decision for the ability of state and local governments throughout the country to structure their relationships with public transit employees and to finance and maintain these essential public services during a period of fiscal stringency.

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[2] The Transit Fact Book is based on surveys by APTA of transit systems throughout the country and information made public by agencies such as the United States Bureau of the Census, the Department of Transportation and the Department of Labor. The Transit Fact Book is the primary source of information about the transit industry in the United States and is generally used and relied upon by persons employed in any field relating to mass transit. Petitioner, respondents and the government all have cited the Transit Fact Book in their briefs as a source of information about the industry.

SUMMARY OF ARGUMENT

The questions presented by this case arise at the intersection of two diverse trends in constitutional doctrine. In recent years, this Court has recognized an expanding reach of Congress' Commerce Clause power. This Court also has developed our understanding of our system of federalism as reflected in the Tenth Amendment and has extended the protection afforded state and local governments from the exercise of federal power. *Compare Wickard* v. *Filburn*, 317 U.S. 111, 118-129 (1942), *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942), *United States* v. *Darby*, 312 U.S. 100, 112-124 (1941), *and NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-41 (1937), *with National League of Cities* v. *Usery*, 426 U.S. 833 (1976). When these constitutional interests conflict, this Court has held that the Tenth Amendment may limit the reach of Congress' Commerce Clause powers when applied to the activities of state and local government.

National League of Cities held that Congress may not regulate the states in such a fashion as to displace their ability to structure integral operations of functions typical of those traditionally performed by state and local governments. This Court concluded, as a matter of law, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) would "impermissibly interfere" with the fundamental right of states to regulate employee relations. 426 U.S. at 851. It therefore held that under the Tenth Amendment and the system of federalism inherent in our Constitution, the FLSA could not be applied to "almost all public employees employed by the States and by their various political subdivisions." *Id.* at 836. To allow otherwise "would impair the States' 'ability to function effectively in a federal system.' " *Id.* at 852 (citation omitted). Lower federal courts have almost uniformly held that the FLSA minimum wage and overtime provisions cannot be applied to state transit employees because local public mass transit is an

integral and traditional state function within the protection of the Tenth Amendment.

Likewise, the Railway Labor Act cannot constitutionally be applied to the state employees of the LIRR, an integral part of the public transit system owned by the MTA, an agency of the State of New York. The freedom to prohibit state employees from striking, as codified in New York's Taylor Law, N.Y. Civ. Serv. Law §§ 200 *et seq.* (McKinney 1973 & Supp. 1980), is a power essential to state sovereignty. The federal Railway Labor Act, in direct conflict with the New York Taylor Law, creates for covered employees a right to strike and establishes federal strike mediation procedures. This Court held in *National League of Cities* that a fundamental determination relating to the structuring of employer-employee relationships is an essential "attribute of state sovereignty," *National League of Cities*, 426 U.S. at 845, with which the federal government may not interfere. The determination of whether state employees should have a right to strike and how potential strikes should be mediated is a critical element of state labor relations, and as such is fundamental to the state's ability to structure employer-employee relationships. Thus, consistent with *National League of Cities*, the Railway Labor Act may not be applied to a state function that is typical of those traditionally performed by state governments.

In his opinion concurring in the plurality decision in *National League of Cities*, Justice Blackmun stated that "it seems to me that [the Court] adopts a balancing approach." 426 U.S. at 856. If a balancing test was applied in *National League of Cities*, it is apparent that the Court found that the state interest in structuring employee relations outweighed the federal interest in labor relations. *Id.* at 851-852. Indeed, by this holding the Court in *National League of Cities* essentially has already struck the balance in favor of the state interest regarding the issues at hand. The state interest in determining whether public employees performing an integral state function should have the right

to strike in the event of labor disputes, and the ensuing impact on the community from disruption of important public services that such a strike might cause, clearly outweighs the federal interest expressed in the Railway Labor Act to establish uniform labor relations, rights and procedures for the interstate railroads.

The primary and almost exclusive activity of the LIRR is provision of local public commuter mass transit service, a service that today is an activity typical of the services state and local governments have provided their citizens. It is as essential and integral to the government's public responsibility in the community it serves as are "fire prevention, police protection, sanitation, public health, and parks and recreation," 426 U.S. at 851, and schools and hospitals, *id.* at 855, which this Court has held are "typical" examples of those "activities which are well within the area of traditional operations of state and local governments." *Id.* at 851, 851 n.16. Today states are called upon to provide local mass transit commuter services because of community need. Local public mass transit, including commuter rail service, should be afforded the protection of the Tenth Amendment because it provides a service to the community at-large that cannot be provided profitably by private parties and that state and local governments typically regard as necessary to the health and welfare of their citizens. In this case, the state has elected to provide these services by railroad. The service performed is what is of constitutional significance, not the means selected by the state to perform that service.

For these reasons, analogies drawn by petitioner and the government to *United States* v. *California*, 297 U.S. 175 (1936), and other decisions involving a state-owned freight railroad would have this Court place form over substance. Nevertheless, should this Court determine that the LIRR is subject to the Railway Labor Act because of its *de minimis* connection with interstate freight railroads, this Court should avoid sweeping within its decision local public mass transit. The latter service does not share any of the char-

acteristics of commercial railroads such as freight carriage or federal regulation as a common carrier; local public mass transit is clearly the type of function performed by state and local government today as an essential public service.

ARGUMENT

THE RAILWAY LABOR ACT WHICH ALLOWS COVERED EMPLOYEES TO STRIKE MAY NOT BE APPLIED TO THE PUBLIC EMPLOYEES OF THE LONG ISLAND RAIL ROAD UNDER THE DOCTRINE OF *NATIONAL LEAGUE OF CITIES* v. *USERY*

In *National League of Cities*, 426 U.S. at 840, this Court restated the commonly accepted rule of law that "the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." The Court recognized, however, that the Commerce Clause, like other clauses in the Constitution, may be restricted by other constitutional provisions. Thus the issue in *National League of Cities*, and the issue in this case, is whether Congress' attempt under the Commerce Clause "to regulate directly the activities of States as public employers," *id.* at 841, violates the Tenth Amendment and our system of federalism because it displaces an "attribute[] of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.* at 845.

As correctly stated by the United States in its brief *amicus curiae*, this Court in *National League of Cities* held that "the 1974 amendments to the Fair Labor Standards Act (FLSA) applying the minimum wage, overtime pay and maximum hour provisions of that Act to 'almost all public employees employed by the States and by their various political subdivisions' (*id.* at 836) were unconstitutional." Brief for the United States as *Amicus Curiae* at 13.

The Court expressly found that "the wages which shall be paid to those whom [the States] employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime," 426 U.S. at 845, are "undoubted attributes of state sovereignty," *id.*, which could not be displaced by Congress. Application of these FLSA requirements "displaces state policies regarding the manner in which [the States] will structure delivery of those governmental services which their citizens require." *Id.* at 847.

> [L]ike the minimum wage provisions, the vice of the [overtime provisions of the] Act as sought to be applied here is that [they] directly penalize[] the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.
>
> This Congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs.

Id. at 849. Indeed, the rationale underlying the decision in *National League of Cities* applies with equal force to the issue before the Court today. This Court stated:

> If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

Id. at 851, *quoting Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911). The Court thus concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," *id.* at 852, and therefore cannot be applied in keeping with the Tenth Amendment and our system of federalism.

This Court set forth concisely in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 101 S. Ct. 2352, 2366 (1981), the considerations that determine whether a federal statute may be applied to a state activity:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854, 96 S. Ct., at 2475. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845, 96 S. Ct., at 2471. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852, 96 S. Ct., at 2472.

The statute involved here must thus be scrutinized under each of these criteria. The Railway Labor Act, by permitting strikes and establishing strike mediation procedures, attempts to impose a structure in a most critical area of employer-employee relationships. As applied to a state agency, such as the LIRR, the Act directly conflicts with the no-strike policy for such state employees contained in the New York Taylor Law, and it directly displaces the state policies governing employee relations—an essential attribute of state sovereignty. Compliance by the LIRR with the Railway Labor Act would impair the state's ability to structure employee relations "within the area of traditional operations of state and local governments." *National League of Cities*, 426 U.S. at 851 n.16.

A. Application Of The Railway Labor Act To The State Employees Of The Long Island Rail Road Constitutes Regulation Of The State Qua State

Respondent LIRR is a wholly owned subsidiary of respondent MTA, an agency of the State of New York. It is beyond dispute that application of the Railway Labor Act

to respondents would constitute an "exercise of congressional authority directed, not to private citizens, but to the States as States." *National League of Cities*, 426 U.S. at 845. It is the state agency's ability to structure employer-employee relationships, in particular to prohibit strikes, that is regulated by the federal statute involved.

This is in sharp contrast to the statute that withstood Tenth Amendment attack in *Hodel*. In that case, this Court upheld a challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977, which established a regulatory program for private surface coal mining operations through joint federal and state regulation. In so doing, the Court emphasized that "the steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." 101 S. Ct. at 2366. On the contrary, the application of the Railway Labor Act here is comparable to the application of the FLSA provisions at issue in *National League of Cities*. In *Hodel*, the Court clearly distinguished *National League of Cities* on the grounds that there the FLSA provisions "pre-empt express state-law determinations" regarding "the wages and work hours of state employees," *id.* at 2365, *quoting National League of Cities*, 426 U.S. at 840. Similarly, the Railway Labor Act pre-empts the New York State law determination that state employees, including employees of the LIRR, may not strike.

Petitioner's argument, Brief for the Petitioner at 19, that "[t]he Railway Labor Act does not regulate the States 'as States'; it regulates interstate railroads, however owned," does not alter the conclusion that the Act, if applied to the employees of the LIRR, is regulation of the state qua state. It can be applied to LIRR employees only if this Court concludes that Congress intended to cover

state employees. It is irrelevant that the state agency is included in the regulatory ambit as part of a larger class that includes private parties as well. The same can be said of the FLSA, since most covered employees under that Act work for private persons and businesses. This Court nevertheless concluded in *National League of Cities*, 426 U.S. at 854, that the FLSA as applied to state employees was a regulation of states as states. *See also Hodel*, 101 S. Ct. at 2365-2366.

B. The Determination Of Whether Or Under What Conditions State Public Employees May Strike Is An Element Of State Employee Relations Of The Type That This Court Has Held Is An Attribute Of State Sovereignty

1. *National League of Cities* established that the determination of wages, hours and overtime compensation for public employees is an "undoubted attribute of state sovereignty." 426 U.S. at 845. This Court reasoned that there would be little left of state sovereignty if "application [of the federal law] will . . . significantly alter or displace the States' abilities to structure employer-employee relationships," *id.* at 851.

The Court cited numerous examples of the ways in which federal regulation of wages and hours for state employees would "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id.* at 847. Federal wage and hour requirements, for example, would increase costs, would eliminate state flexibility to hire those with little training at a lower salary or to use volunteer labor, and would require the states "to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *Id.* at 846-851.

In *National League of Cities*, the "undoubted attribute of state sovereignty," *id.* at 845, to which this Court re-

ferred was the state's power over wages, hours and overtime—essential elements in structuring employee relations. The United States and petitioner are therefore flatly wrong in positing that the issue before this Court is whether the "[o]peration of a railroad" is an essential attribute of state sovereignty with which the federal government may not interfere. Brief for the United States as *Amicus Curiae* at 15. *See also* Brief for the Petitioner at 37-38. Rather, the threshold question before this Court is whether the state's power to determine whether its employees have the right to strike—a crucial element of state employee relations—is an attribute of state sovereignty. The effect of strikes and the power to strike on employee relations is so significant that this Court must conclude that such a determination is as essential an attribute of state sovereignty as is setting the wages, hours and overtime compensation for its employees.[3]

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[3] A holding for the respondents would not affect the numerous lower court decisions finding *National League of Cities* inapplicable to federal statutes other than the Railway Labor Act or the Fair Labor Standards Act.

Some of these decisions have upheld federal statutes on constitutional grounds other than the Commerce Clause; *National League of Cities* did not resolve whether the Tenth Amendment limits other constitutional provisions. 426 U.S. at 852 n.17. Relying in part on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), lower courts have found that the Tenth Amendment and federalism limitations articulated in *National League of Cities* are not applicable to statutes grounded in certain other constitutional powers. For example, some courts have found that the Equal Pay Act is authorized by Section 5 of the Fourteenth Amendment. *E.g.*, *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978); *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Similarly, in *Arritt* v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977), the court relied on the Fourteenth Amendment to uphold the applicability to state and local governments of the Age Discrimination in Employment Act

As the court below found, "the freedom to strike affects the collective bargaining process and could result in re-

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of 1976. Like reasoning has been used in upholding application of the Veterans' Reemployment Rights Act to state and local governments as an exercise of the war power. *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979). *Cf. National League of Cities*, 426 U.S. at 854 n.18.

Other lower courts have upheld the application of certain federal statutes to state and local governments as valid exercises of the Commerce Clause despite Tenth Amendment challenges based on *National League of Cities*. *E.g.*, *Pearce* v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979) (Equal Pay Act); *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978) (Equal Pay Act); *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2nd Cir.), *cert. denied*, 434 U.S. 902 (1977) (Clean Air Act Amendments of 1970). These decisions involve fundamentally different federal statutes and state policies. Thus, the nature of the federal interference under, for example, the Equal Pay and Clean Air Acts with the state or local government's ability to structure the delivery of governmental services is wholly different from the displacement of the state's ability to structure employee relations resulting from application of the Railway Labor Act or the wage and hour provisions of the FLSA. This court reaffirmed in *National League of Cities* the holding in *Fry* v. *United States*, 421 U.S. 542 (1975), that the Economic Stabilization Act "was constitutional as applied to temporarily freeze the wages of state and local employees." 426 U.S. at 852. It distinguished the statute in *Fry* from the wage and hour provisions of the FLSA because the former "merely required that the wage scales and employment relationships which the *States themselves had chosen* be maintained during the period of the emergency." *Id.* at 853 (emphasis added). Similar reasoning was applied in *Friends of the Earth*, where the court specifically found that "the State's freedom *to choose and formulate its own policy* concerning crucial local issues was preserved by and written directly into the Clean Air Act Amendments of 1970." 552 F.2d at 38 (emphasis added). Courts examining the Equal Pay Act as authorized by the Commerce Clause have made comparable findings. For example, in *Pearce*, it was found that the Equal Pay Act "leaves the states free to set all substantive terms of employment"

quiring the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause." 634 F.2d at 25.[4] Indeed, in ruling in *Maryland* v. *Wirtz*, 392 U.S. 183, 195 (1968), on the application of the wage and hour provisions of the FLSA to state hospitals and schools, this Court recognized that strikes are an element of "labor conditions" very much related to the determination of wages and hours. The holding of *Wirtz* was reversed in *National League of Cities*, but this characterization of strikes and work stoppages as an element of the category in which this Court has placed wages and overtime—*viz.*, labor conditions—survives. Therefore, determination of whether the public employees of a state agency have the right to strike is an "undoubted attribute of state sovereignty." 426 U.S. at 845.

2. Petitioner argues that the Railway Labor Act establishes a procedure for negotiation by a state with its employees but does not impose substantive requirements on the state such as mandating any particular terms of employee compensation. Brief for the Petitioner at 43. The effect of a strike by public employees providing an important service to the community at-large is so significant that the existence of a right to strike has a substantive effect on the freedom of the state as employer to negotiate the terms of employment necessary to ensure continued operation of state governmental services. Furthermore, petitioner speaks of the state employees' "ultimate" "right

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and requires only that the substantive terms of employment not be determined arbitrarily or in a discriminatory fashion. 590 F.2d at 132. The statute at issue here, however, does not leave the state free to determine whether its public employees should have the right to strike.

[4] The opinion of the court of appeals is reprinted as Appendix A to the Petition for Certiorari.

to strike," *see, e.g., id.* at 45;[5] a right is by its very definition a matter of substance.

President Reagan recently demonstrated that the determination of whether public employees should be allowed to strike is a fundamental aspect of governmental sovereignty. In his response to an allegedly illegal strike by members of the Professional Air Traffic Controllers Organization union—employees of the federal government—the President articulated the importance of the government-employer's retaining control over whether its employees may strike:

> [W]e cannot compare labor-management relations in the private sector with government. Government cannot close down the assembly line. It has to provide without interruption the protective services which are government's reason for being.

Statement to the Press, 17 Weekly Comp. of Pres. Doc. 845 (Aug. 10, 1981). President Reagan shortly thereafter reaffirmed that "[p]ublic employees cannot strike against the public." Remarks at a Target '82 Republican Fundraising Reception, 17 Weekly Comp. of Pres. Doc. 904 (Aug. 31, 1981).

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[5] Federal employees are prohibited by law from asserting a right to strike against the federal government. 5 U.S.C. § 7311(3) (1976); 18 U.S.C. § 1918 (1976). It is clear that both state and federal governments have the power to prevent their employees from striking. *See, e.g., Bennett* v. *Gravelle*, 451 F.2d 1011, 1012 (4th Cir. 1971); *Olshock* v. *Village of Skokie*, 401 F. Supp. 1219, 1220 (N.D. Ill. 1975); *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971); *City of New York* v. *DeLury*, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128 (1968), *appeal dismissed*, 394 U.S. 455 (1969).

C. The Provision Of Commuter Transportation Services Is A State Activity Typical Of Services States Traditionally Have Afforded Their Citizens

National League of Cities held that federal law which displaces an attribute of state sovereignty may not be applied to state "activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. "Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens." *Id.* This Court also referred interchangeably to these functions as "integral governmental functions," *id.* at 855, "important governmental activities," *id.* at 847, "governmental services which their citizens require," *id.*, "an area that the States have regarded as integral parts of their governmental activities," *id.* at 854 n.18, and "integral operations of state governments," *id.* at 852 n.17.

Provision of commuter rail service as a part of an integrated local public transit system is the type of activity typically performed today by state and local governments around the country in providing important public services to the community at-large. State and local governments exist to provide services that aid the public health and welfare and that should be available to all sectors of the community regardless of their profitability. Indeed, local public commuter mass transportation services are so similar to the functions this Court has found worthy of protection that the doctrine of *National League of Cities* encompasses such services.

National League of Cities noted as examples of protected activities "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Wirtz*, schools and hospitals were included as

well. *Id.* at 855. These examples were merely a listing of a few of the most obvious of the activities that state and local governments typically consider their responsibility to provide. This Court expressly emphasized the breadth of its decision:

> These examples are obviously not an exhaustive catalogue of the *numerous* line and support activities which are well within the area of traditional operations of state and local governments.

Id. at 851 n.16 (emphasis added).

National League of Cities also preserved this Court's holding in *United States* v. *California*, 297 U.S. 175 (1936), that the federal Safety Appliance Act requirements for coupling devices on interstate railroad cars may be applied to the State Belt Railroad. 426 U.S. at 854 n.18. *United States* v. *California*, however, is in no way controlling here.[8] There the railroad served only industrial plants on San Francisco Harbor and "[t]he larger part of this traffic has its origin or destination in states other than California." 297 U.S. at 181. This Court in *National League of Cities* distinguished state-operated freight railroads from activities "typical of those performed by state and local governments," 426 U.S. at 851, because "[t]here California's activity to which the congressional command was directed was not in an area that the *States have regarded* as integral parts of their governmental activities." *Id.* at 854 n.18 (emphasis added). It was, on the contrary, the operation of a railroad engaged in " 'common carriage by rail in interstate commerce. . . .' " *Id., quoting United States* v. *California*, 297 U.S. at 182. Moreover, in narrowing this hold-

[8] Clearly whether a state-owned railroad must use a coupling device on freight cars engaged in interstate commerce is not a determination that is an essential attribute of state sovereignty, unlike a determination as to whether state public employees should have the right to strike.

ing, this Court expressly rejected the following "dicta from *United States* v. *California*," 426 U.S. at 854-855:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

Id. at 854, *quoting Maryland* v. *Wirtz*, 392 U.S. at 198, *quoting United States* v. *California*, 297 U.S. at 185.

Petitioner's emphasis on facts concerning past regulation of the LIRR as a railroad common carrier begs the question presented. The LIRR is the means selected by the State of New York to provide commuter transportation services to its citizens. It is this provision of commuter transportation that is an activity "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. In *United States* v. *California*, the activity in which the state was engaged was the hauling of freight in interstate commerce and the means selected was by railroad. Neither respondents nor APTA argues that the hauling of freight is an activity typical of the kinds of activities the states have traditionally provided their citizens.

It is for this reason that *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), also are clearly distinguishable from the case at bar. *Parden* held that a state may not assert sovereign immunity in a personal injury action brought by an employee of a state-operated freight railroad. *Taylor* again involved the State Belt Railroad and held that the Railway Labor Act may be applied to its activities. In both these cases, as in *United States* v. *California*, it cannot be said that engaging in the hauling of freight by rail is "an area that

the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18. The provision of commuter mass transportation services, on the other hand, is an activity in which state and local governments have typically engaged "in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

Furthermore, *Parden*, *Taylor* and *United States* v. *California* should be read narrowly because they were decided before *Wirtz* was overruled and at a time when this Court believed that Congress' exercise of Commerce Clause power was no more limited in its application to state activities than it was when used to reach private activities. *Cf. Fry* v. *United States*, 421 U.S. 542, 551 (1975) (Rehnquist, J., dissenting). After *National League of Cities*, this is no longer the law.

In determining whether commuter mass transportation services are functions typically provided by the states, this Court should follow the dictate of *National League of Cities* and give substantial weight to the judgment of state and local governments. 426 U.S. at 854 n.18. In calendar year 1978, there were 463 transit systems owned by state or local governmental agencies. Transit Fact Book at 38. These included 102 of the 106 metropolitan areas in the country with a population over 200,000. Urban Mass Transportation Administration, U.S. Department of Transportation, *Public Transportation Service* (1979). These public systems are used primarily for home-to-work commuter transportation.[7]

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[7] Usage of local mass transit increases dramatically during commuting hours, while the automobile is preferred for discretionary social and recreational travel on evenings and weekends. 109 Cong. Rec. S 207 (daily ed. Jan. 14, 1963) (remarks of Sen. H. Williams); W. Owen, *The Metropolitan Transportation Problem* at 211 (rev. ed. 1966). At least one-half of the downtown workforce in several major urban centers depends upon transit to reach the workplace. *Transit Assistance Act of 1981: Hearings on S. 1160 Before the*

If such a substantial number of state and local governments have determined that they must provide publicly owned commuter transportation services, particularly in urban areas, this function must be considered an activity typical of those states have traditionally afforded their citizens and therefore entitled to protection under the doctrine of *National League of Cities.*[8]

The State of New York should not be penalized for determining that the most efficient means of providing commuter transportation services to its citizens is via railroad. The patterns of living and working in the New York City metropolitan area require that many commuters travel a long distance to their place of work. The infrastructure for

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Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 87 (1981) (statement of K. Slapin on behalf of the National League of Cities); *id.* at 97 (statement of L. Ronis, President of the American Public Transit Association).

[8] Examples of state laws decreeing public mass transit to be an important function of government are considered in *Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore* v. *Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978) (quoting an amendment to the state constitution providing that public transportation is an "essential governmental function"); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 225 S.E.2d 424, 427 (Ga. 1976) (same); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 298 A.2d 413, 415 (Md. Ct. App. 1973) (quoting a Maryland statute that the Metropolitan Transit Authority is performing "an essential governmental function"); *Teamsters Local Union No. 676* v. *Port Authority Transit Corp.*, 261 A.2d 713, 716 (N.J. Sup. 1970) (same—New Jersey statute); *County of Niagara* v. *Levitt*, 411 N.Y.S.2d 810, 812 (Sup. Ct. 1978), *modified*, 428 N.Y.S.2d 675, 406 N.E.2d 490 (Ct. App. 1980) (same—New York statute); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 281 A.2d 882, 885 (Pa. 1971) (same—Pennsylvania statute).

the LIRR was in place. Certainly this Court would not require a state desiring to maintain flexibility in its operation of commuter transportation services to forego purchasing a commuter railroad that the private sector could no longer afford to operate profitably, such as the LIRR, and instead require the state to purchase buses or install trolley cars so as to provide a service necessary to the health and well-being of its citizens.

Thus this Court should not evaluate commuter trains in isolation, but rather it should consider them as an integral part of local urban mass transportation systems throughout the United States. As urban areas have become more congested, the need for public mass transit systems has evolved.[9] The responsibilities of state and local governments as well as the federal government have had to evolve and expand in order to continue to provide the kinds of services citizens have typically expected from government—those services generally available to the community at-large which promote a civilized and healthy life. It was recognized in *New York* v. *United States*, 326 U.S. 572, 579 (1946) (Opinion of Frankfurter, J.), that "a static concept of government denies its essential nature."[10] As the needs

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[9] In enacting the Urban Mass Transportation Act of 1964, Congress found that "the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas" and that "the satisfactory movement of people and goods within such areas . . . are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services." 49 U.S.C. § 1601 (1976).

[10] *See also Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), where the court interpreted the definition in *National League of Cities* to "suggest[] that the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times." *Id.* at 1037. In holding that the operation of a municipally-owned airport is an integral governmental function

of state citizens have evolved, state and local governments have had to alter the activities in which they engage in performing their traditional functions of providing for the public health and welfare.[11] *Cf. Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978). At the same time, as Chief Justice Burger noted in *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 421 n.2 (1978) "[o]ur conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved."[12]

In 1966, through acquisition of the LIRR, the State of New York entered into the activity of providing commuter transportation services. While public ownership of local transit began around the turn of the century, it became pervasive over the past twenty years as private companies increasingly found it impossible to provide service without incurring significant losses. Transit Fact Book at 55. By acquiring the LIRR, the State of New York did not elect

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within the meaning of *National League of Cities*, the court in *Amersbach* stated:

> We would have difficulty in concluding that, in the economy of the present day, the maintenance of a municipal airport is not an integral function of government.

Id. at 1038. *See also* opinion of the court below. 634 F.2d 19, 26 (2d Cir. 1981).

[11] According to W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966), "[t]oday nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics and a long list of others."

[12] The Tenth Amendment and our system of federalism do not require that all state activities be protected from federal intrusion. This Court need not consider whether competition by states in profitable business activities or provision of services to a discrete group of commercial users is protected.

to enter "an industry that has been comprehensively regulated by the United States for nearly a century." Brief for the United States as *Amicus Curiae* at 22. Instead, it assumed a service necessary to the community at-large that could not be provided by the private sector without substantial economic losses and which was destined to be abandoned. The court below found that if the state had not taken over this function, it would have gone unprovided. "The substantial state and local funds used to subsidize the [LIRR] attest to the fact that no private businessman would dare undertake the venture." 634 F.2d at 28 (footnote omitted). This was similar to the nationwide situation at that time in history. Changing demographic patterns, rising costs of labor and equipment, the deterioration of inner city areas, increasing demand for low fare service to the elderly, the handicapped and students, and emerging problems of air pollution, energy dependency and traffic congestion all converged to increase significantly the public demands made on local transit systems while, at the same time, making it economically impossible for private entities to continue to respond to this demand. *See, e.g.,* Transit Fact Book at 46-48. Public ownership became inevitable as state and local governments throughout the country determined that they could not allow their citizens to be without such services.[13]

States and their political subdivisions are the principal providers of mass transit services. Transit Fact Book at 55. About ninety percent of transit revenues, total transit

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[13] Congress has found that "for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably . . . [but that] in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service." 49 U.S.C. § 1601b (1976).

miles, and linked passenger trips [14] are attributable to publicly owned mass transit systems. *Id.* at 38-39. Heavily subsidized by general and special tax revenues, local public transit systems maintain low fares to serve the transportation needs of the entire community. *Id.* at 19, 46-48, 56. Organizationally, local public transit systems are often managed by departments of city government and are integrated or closely coordinated with other essential governmental services and departments. *Id.* at 55-56. In addition, public transit serves the overall interest of the community, *inter alia*, by reducing traffic congestion, promoting rational land use, revitalizing inner-city areas, facilitating employment, conserving energy, and preventing pollution. *Id.* at 50-54; 59-62.

Meeting this changing public demand has required substantial financial support from general tax revenues. Federal assistance contributes only fifteen percent of the operating costs of local public transit systems. State and local governments provide about a third of operating costs. *Id.* at 19. Moreover, current federal policy favors phasing out federal operating assistance and requiring state and local governments to assume the total responsibility for operating costs. Office of the Press Secretary, The White House, *President's Budget Reform Plan* at 4-28 (1981); *Transit Assistance Act of 1981: Hearings on S.1160 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 3 (1981) (Statement of D. Lewis, Secretary, U.S. Department of Transportation); N.Y. Times, May 10, 1981, at E5.[15]

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[14] Linked passenger trips includes trips taken by initial-board (originating) transit patrons and excludes all transfer and charter rides. It includes patrons paying full fare, reduced fare, or no fare. Transit Fact Book at 8.

[15] Furthermore, the federal government has recently recognized the preeminence of the state interest in determining the terms on

Thus, local public transit systems are—and will continue to be—an important local public service for which state and local governments have, of necessity, assumed the responsibility.

Provision of intrastate commuter passenger service by the LIRR, which involves ninety-five percent of its workforce, is not only a service typically and necessarily provided by local public transit systems throughout the country but it is an integral part of the MTA's comprehensive public urban transit system for the New York City metropolitan area. To classify one component of the MTA system as an interstate railroad for the purpose of overriding state laws applicable to public employees would be to exalt form over substance. Nonetheless, should this Court decide that the LIRR must be considered for this purpose an interstate railroad—rather than an integral part of the system of local public mass transit in this country—this Court should make clear that it is not concluding that local public mass transit is not an integral or traditional function of state and local government. Unlike interstate railroads, local public mass transit has never been subject to federal common carrier regulation. While it is APTA's position that the LIRR is simply an alternative to buses, subways or other mass transit vehicles for which it substitutes, both petitioner and the United States assert there is a constitutionally significant distinction. Petitioner contends that

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which it provides mass transit. In reversing an earlier Environmental Protection Agency (EPA) proposal to disapprove the New York City metropolitan area's public transit plan because it did not adequately meet federal Clean Air Act standards, the Administrator of the EPA stated:

> EPA agrees that the State should have ultimate responsibility for identifying its transit needs and deciding how to meet them . . . . Also, this approach appears in the proposed EPA/USDOT [Department of Transportation] national policy on basic transportation needs.

46 Fed. Reg. 44980 (Sept. 9, 1981).

the "LIRR is *unique* in that it is the only state owned and operated Class I railroad in the United States carrying both interstate freight and the travelling public."[16] Brief for the Petitioner at 13 (emphasis added). The United States argues that the LIRR is "plainly distinguishable from conventional intraurban transit systems." Brief for the United States as *Amicus Curiae* at 12. It expounds at length on the separate regulatory environment, histories and usages of the terms commuter rail and local public mass transit. *Id.* at 25-27, nn. 19-20. APTA urges the Court to find that the LIRR is an integral governmental function but, in any event, not to fashion a decision that would affect local public mass transit adversely without having a complete picture of those services before it.[17]

D. The State Interest In Determining Whether Its Public Employees May Strike Prevails Over The Federal Interest In Labor Relations Even If A Balancing Test Is Applied

Justice Blackmun, in his concurring opinion in the plurality decision in *National League of Cities*, stated that it was his understanding that the Court "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426

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[16] Petitioner's elevation of interstate freight service to equal status with commuter service is disingenuous. In 1979, only 4% of LIRR's gross revenue was derived from freight operations. Respondents' Brief in Opposition to the Petition for Certiorari at 4. In that same year, less than 5% of the LIRR's workforce was engaged in the handling of freight. *Id.* Thus the overwhelming function served by the LIRR is its function other than freight transport—that of transporting commuter passengers.

[17] Those lower courts that have examined local public mass transit systems have all, except one federal district court, found these systems to fulfill traditional and integral governmental functions. *See* cases cited in note 1 *supra*.

U.S. at 856. The court below invoked this balancing approach to determine whether "the federal interest in regulating the collective bargaining relations of LIRR employees under the Railway Labor Act [outweighs] the State's interest in applying the Taylor Law." 634 F.2d at 24.[18]

The federal interest under the Railway Labor Act is to provide procedures for collective bargaining for the general purposes of avoiding "any interruption to commerce," to "provide for the prompt and orderly settlement of all disputes," and to forbid limitation of the "freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization." 45 U.S.C. § 151a (1976).

The first part of Justice Blackmun's balancing test requires an examination of the strength of this federal interest in comparison to the interest of the state. The state interest in determining whether its public employees should have an unsanctionable right to strike is so great that the federal interest cannot be said to outweigh it. Employee relations, including the determination of wages and hours, overtime compensation and whether public employees have a right to strike, is a matter of internal management of a state's affairs. A strike or threat of strike has severe implications for state budgets and cost planning, personnel administration, employee relationships, the continuity of important public services and the maintenance of public order. Indeed, the state's very ability to perform necessary

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[18] Other circuits have also found "helpful the balancing approach suggested by Justice Blackmun," *Public Service Co. of North Carolina* v. *Federal Energy Regulatory Comm'n.*, 587 F.2d 716, 721 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979), and have compared the strength of the asserted federal interest with the state interest. *See, e.g., Peel* v. *Florida Dept. of Transportation*, 600 F.2d 1070, 1083-1085 (5th Cir. 1979); *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978).

public services is significantly affected by potential strikes. Moreover, it is incongruous to impose federal rights to strike and strike procedures on some state employees involved in important public services but not on others. Such federal intervention is divisive and undermines the efficacy of state laws prohibiting strikes by other state employees who perform functions where the federal government has no interest or where its intervention is precluded by the Tenth Amendment.

In striking the balance in this case, the state interest in determining whether its own public employees performing an integral state function should have the right to strike is clearly paramount to the federal interest in uniform procedures for employee bargaining. Assuming *arguendo* that the fundamental purpose of both the federal and state statutes is to prevent strikes, a federal goal in so doing is to prevent disruption to the interstate rail system and a state goal is to prevent disruption to transit in the New York metropolitan area. In the event a strike shuts down the LIRR, it cannot be said that the disruption to the railroad industry at-large or to the interstate freight system from loss of the *de minimis* LIRR freight operations would be more harmful than the injury to the State of New York, and the New York metropolitan area in particular, from disruption of commuter transportation. Logic compels that New York State's need to determine the means of preventing disruption of LIRR service to the millions of city commuters far exceeds the interest of the federal government.[19]

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[19] *National League of Cities* has struck the balance between the federal interest under the Fair Labor Standards Act in regulating state employee relations and the state interest. It ruled in favor of the states. If this Court chooses to strike a different balance under the Railway Labor Act, it should make clear that it is not overruling *National League of Cities* and the judgment in that case regarding the Fair Labor Standards Act.

The second part of the balancing test requires consideration of whether state compliance is essential to accomplishment of the federal objective. Exemption of the LIRR from the federal statutory scheme would have an insignificant impact on the federal government's efforts to regulate labor relations since so little of the LIRR's activity is in interstate freight transportation. The United States cannot seriously claim that this result would frustrate achievement of the federal purpose.

Thus it must be concluded that the state interest in determining whether state employees should have the right to strike may not be displaced by the federal government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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